

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT NASHVILLE  
May 10, 2006 Session

**GREGORY PAUL LANCE v. STATE OF TENNESSEE**

**Direct Appeal from the Criminal Court for Putnam County**  
**No. 99-0054     John A. Turnbull, Judge**

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**No. M2005-01765-CCA-R3-PC - Filed August 16, 2006**

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The petitioner, Gregory Lance, appeals the denial of his petition for post-conviction relief from his convictions for first degree murder, especially aggravated burglary, and arson, arguing that the post-conviction court erred in finding that he failed to prove ineffective assistance of appellate counsel. On appeal, he essentially argues that appellate counsel, who raised ineffective assistance of trial counsel as an issue on direct appeal, was ineffective in the following ways: (1) by failing to argue that the extended trial hours violated the petitioner's right to effective counsel and due process of law; (2) by failing to argue that trial counsel was ineffective for not objecting to the State's improper closing argument; and (3) by failing to adequately argue for the admissibility of a hearsay statement that would have suggested that a third party, Sam Horn, was the true culprit in the crimes. Following our review, we affirm the denial of the petition.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed**

ALAN E. GLENN, J., delivered the opinion of the court, in which JERRY L. SMITH, J., joined. GARY R. WADE, P.J., Not Participating.

Samuel J. Harris, Cookeville, Tennessee, for the appellant, Gregory Paul Lance.

Paul G. Summers, Attorney General and Reporter; Elizabeth B. Marney, Assistant Attorney General; William Edward Gibson, District Attorney General; and David A. Patterson, Assistant District Attorney General, for the appellee, State of Tennessee.

**OPINION**

**FACTS**

In October 2002, the petitioner was convicted by a Putnam County Criminal Court jury of two counts of first degree premeditated murder, especially aggravated burglary, and arson, for which he received an effective sentence of life imprisonment. His convictions were affirmed by this court on direct appeal and our supreme court denied his application for permission to appeal. See State

v. Gregory Lance, No. M2001-02507-CCA-R3-CD, 2003 WL 1960270, at \*1 (Tenn. Crim. App. Apr. 28, 2003), perm. to appeal denied (Tenn. Oct. 27, 2003).

The petitioner's convictions stemmed from the August 5, 1998, shooting deaths of the victims, husband and wife Victor and Alla Kolesnikow, and the arson of their home. Our direct appeal opinion provides a synopsis of the evidence presented against the petitioner at trial:

The record shows that the victims were seeking to foreclose on Defendant's trailer park. The victims were killed two days prior to a hearing on whether the foreclosure could go forward in light of Defendant having filed for relief in bankruptcy. . . . .

Three witnesses testified that prior to the murders, Defendant solicited their help in hiring someone to kill the victims or finding a stolen gun. . . . .

. . . Three days prior to the murders, Defendant was seen target shooting at the Herron farm. Bullets and shell casings from the Herron farm were matched to a weapon found on the Bohannon farm near the victims' home. Bullets and shell casings from the murder scene and a bullet recovered from the victim's body also matched the same weapon found on Mr. Bohannon's farm. Erik Tanner and Keith Herbstreith both testified that they recognized the green cord and the black flashlight attached to the gun as having belonged to Defendant. . . . .

In addition, Joel Brown and Steve Powell discovered two full cans of gasoline at the Herron farm on the evening of the day that Defendant was seen at the property. The gas cans had not been there the day before. The gas cans remained there until the night before the murders. Defendant's shoes and socks were tested for the presence of gasoline, and the test revealed a gasoline range product. Hairs on the backs of Defendant's hands were singed.

Mike Herron alerted Defendant to the investigation when he called to ask Defendant to check on his property. One day before investigators searched the Herron property, Defendant was seen burning wood and dresser drawers, which the jury could reasonably conclude held bullet fragments from Defendant's target practice.

Defendant traveled to Arizona following the murders. Defendant refused to speak to Rocky Harmon on the phone after the murder, believing that his phone was tapped. Defendant warned Harmon not to talk to investigators. When Erik Tanner returned to Tennessee from Arizona, Defendant did not allow him to stay at his home and warned him to avoid the TBI.

Id. at \*17.

On September 9, 2004, the petitioner filed a *pro se* petition for post-conviction relief in which he raised numerous claims, including ineffective assistance of trial and appellate counsel. Following the appointment of post-conviction counsel, he filed an amended petition on March 7, 2005, in which he alleged, among other things, that post-conviction counsel was ineffective for failing to raise or adequately argue the proper issues on direct appeal.

Five witnesses testified at the evidentiary hearing: appellate counsel, senior trial counsel, junior trial counsel, the assistant district attorney who prosecuted the case, and the petitioner. We will, however, summarize only the portions of the testimony which are relevant to the issues raised in this appeal. Appellate counsel, who said he was retained after the petitioner dismissed his prior counsel, testified that he represented the petitioner from the motion for a new trial through the filing of the application for permission to appeal to the supreme court. As he recalled, the date for the hearing for the motion for new trial had already been set by the time he was retained and the trial court would not grant a continuance unless he agreed to raise the issue of ineffective assistance of trial counsel. He said he was aware of the problems associated with raising a claim of ineffective assistance of counsel on direct appeal but believed that it was in the petitioner's best interest for him to gain the additional time to prepare for the motion for new trial.

Appellate counsel testified that he and his two associates reviewed the trial record, including the closing argument, and raised what he believed to be the most meritorious issues on appeal. He said that he did not see any issues associated with the closing argument that were as strong as the issues he raised and that he did not believe in using the "shotgun" approach of raising any and all possible issues on appeal. Furthermore, he agreed with the post-conviction court that, even had he raised the issue of improper closing argument on appeal, it would have been reviewed only for plain error since trial counsel did not object to closing argument.

Appellate counsel acknowledged he did not include trial counsel's failure to object to improper closing argument as one of the eight instances of ineffective counsel he alleged on appeal. He said he had read the portions of closing argument highlighted by post-conviction counsel and found only the first part of the following statement by the prosecutor objectionable: "I don't believe it and you don't have to believe it." He stated that he could not recall having noticed that statement when he reviewed the voluminous trial transcript and that, had he noticed it, he probably would have raised it as an issue on appeal. He testified he never considered raising the issue of the long trial days as an issue, stating that he did not notice any signs of trial fatigue from his reading of the transcript, did not believe that trial counsel ever objected to the schedule, and did not think he was even aware of the trial schedule at the time he filed the appeal.

Appellate counsel acknowledged that he relied on Tennessee Rule of Evidence 804, the hearsay exception based on the unavailability of a declarant, rather than Rule 803(3), the state of mind exception, when arguing that trial counsel was ineffective for failing to introduce testimony by Chris Henry that Sam Horn had threatened to kill the victims and had stated after the killings that he had taken care of the problem. Appellate counsel said that he chose to argue the 804 exception because he believed that, if successful, it would have resulted in the admission of both statements:

I thought under 804 we could get it all in. Of course, in that . . . And I thought that that's what the defense counsel should have done under 804. All they had to do I thought was to subpoena the Horns. If they were unavailable, they could get it in. If they came and admitted it, they would be all very well. And if they came and denied it, then you could put your witness on, Mr. Henry, to impeach them.

So I felt that that way you could get all of the statement in, not just part of it, which is the reason we centered on 804.

On cross-examination, appellate counsel testified that he had been a trial lawyer since 1972, that he had tried many murder cases and handled numerous appeals, and that he and his associates had spent a "huge number of hours" in preparation for the petitioner's case. He could not recall the petitioner's having ever mentioned to him the length of the trial days but, regardless, did not think that the long trial hours would have been a realistic issue to raise on appeal given trial counsel's failure to object to the trial schedule. He said that, in hindsight, the only mistake he thought he made was in not raising trial counsel's failure to object to the prosecutor's improper statement as part of his ineffective assistance of counsel claim. However, he still did not think it was as strong an issue as the other issues he raised:

I will say that when we looked at it, I didn't pick that out as an issue. I really didn't. Now, in retrospect sitting here today, after we've discussed this, I have said that I should have raised that. I think I should have. Do I think it would have been . . . more important than the other issues? No, I do not, but I would have raised it. And I don't know what the courts would have done with it.

On redirect examination, post-conviction counsel showed appellate counsel the transcript of the motion for new trial hearing, in which appellate counsel informed the trial court that he had not yet received the portions of the trial transcript that contained opening and closing arguments. Appellate counsel acknowledged that, based on that transcript, he obviously had not had the opportunity to review the closing argument at the time he filed the motion for new trial. He said that he thought he recalled that he had a great deal of difficulty in getting the transcripts from the court reporter.

Senior trial counsel, who said that he had been practicing law for thirty-three years, testified that he was a public defender and was appointed to represent the petitioner after an initial trial date had already been set. He recalled that it was a long and tiring trial and said he perhaps did not object to the trial pace because he was "too tired to even think to object." He stated that he had intended to raise the trial pace in the motion for new trial had his office handled that motion. He testified that the prosecutor's expression of his personal opinion, "I don't believe it," was probably objectionable and that, although he could not specifically recall, it could have been a tactical decision on his part not to object in order not to reinforce the statement in the jury's mind. On cross-examination, he acknowledged that the trial court took the usual breaks and that the trial schedule was not highly

unusual. He conceded that the State presented compelling evidence against the petitioner and said that he did not think the outcome of the case had turned on the prosecutor's improper statement.

Junior trial counsel testified that he could not recall whether they had a specific trial strategy of not objecting during closing argument but that it was possible they did. He explained, "Often in closing, you're not sure what to say. If you object to it, you've rung the bell and almost pointed the jury to 'Hey, whatever the D.A. just said is fairly important.'" He said he recalled that he and senior trial counsel were both very tired by the time of closing because they had been in trial all week and the trial had involved unusually lengthy days. On cross-examination, he testified that he probably would not have objected even had he not been tired because he typically did not object during closing unless the prosecutor said "[s]omething horrible." Junior trial counsel said that, overall, the prosecutor's closing argument was as fair as any he had ever heard presented by the State.

The assistant district attorney who prosecuted the case testified that his use of the phrase "I don't believe it" was not an intentional act on his part to express his personal opinion but instead a "poor choice of words after a long trial." He said that the trial "moved along at a good pace," but the trial court was also sensitive to the pace and afforded plenty of breaks. On cross-examination, he testified that, when given a choice, jurors on a sequestered jury, as in the case at bar, typically prefer to work further into the night as opposed to returning to a motel room.

The petitioner testified that he had very little time in the evenings to speak to trial counsel and that counsel looked very fatigued when he discussed whether the petitioner should testify at trial.

On June 10, 2005, the post-conviction court entered a Memorandum Opinion denying the petition for post-conviction relief. Among other things, the court found that the petitioner failed to show either a deficiency in performance or resulting prejudice based on appellate counsel's failure to raise the accelerated court sessions as an issue on appeal. The post-conviction court further found that the petitioner did not meet his burden of demonstrating that his appeal would have been successful had appellate counsel raised the issues relating to the improper closing argument or the admission of hearsay testimony under Tennessee Rule of Evidence 803(3).

### **ANALYSIS**

The post-conviction petitioner bears the burden of proving his allegations by clear and convincing evidence. See Tenn. Code Ann. § 40-30-110(f) (2003). When an evidentiary hearing is held in the post-conviction setting, the findings of fact made by the court are conclusive on appeal unless the evidence preponderates against them. See *Tidwell v. State*, 922 S.W.2d 497, 500 (Tenn. 1996). Where appellate review involves purely factual issues, the appellate court should not reweigh or reevaluate the evidence. See *Henley v. State*, 960 S.W.2d 572, 578 (Tenn. 1997). However, review of a trial court's application of the law to the facts of the case is *de novo*, with no presumption of correctness. See *Ruff v. State*, 978 S.W.2d 95, 96 (Tenn. 1998). The issue of ineffective assistance of counsel, which presents mixed questions of fact and law, is reviewed *de novo*, with a

presumption of correctness given only to the post-conviction court's findings of fact. See Fields v. State, 40 S.W.3d 450, 458 (Tenn. 2001); Burns v. State, 6 S.W.3d 453, 461 (Tenn. 1999).

The same standard that applies to a claim of ineffective assistance of trial counsel applies to a claim of ineffective assistance of appellate counsel. To establish a claim of ineffective assistance, the petitioner has the burden to show that counsel's performance was deficient and that counsel's deficient performance prejudiced the outcome of the proceeding. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984); see State v. Taylor, 968 S.W.2d 900, 905 (Tenn. Crim. App. 1997) (noting that same standard for determining ineffective assistance of counsel that is applied in federal cases also applies in Tennessee). The Strickland standard is a two-prong test:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

466 U.S. at 687, 104 S. Ct. at 2064.

The deficient performance prong of the test is satisfied by showing that "counsel's acts or omissions were so serious as to fall below an objective standard of reasonableness under prevailing professional norms." Goad v. State, 938 S.W.2d 363, 369 (Tenn. 1996) (citing Strickland, 466 U.S. at 688, 104 S. Ct. at 2065; Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975)). The prejudice prong of the test is satisfied by showing a reasonable probability, *i.e.*, a "probability sufficient to undermine confidence in the outcome," that "but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694, 104 S. Ct. at 2068.

The petitioner first contends that appellate counsel provided ineffective assistance for failing to raise the consecutive, accelerated trial sessions, or trial counsel's failure to object to them, as an issue on direct appeal. Citing State v. Parton, 817 S.W.2d 28 (Tenn. Crim. App. 1991), he argues that the grueling trial schedule, which took a mental and physical toll on his counsel and negatively affected counsel's ability to provide effective assistance at trial, violated his due process rights to a fair trial. The State argues that the record supports the post-conviction court's finding that the petitioner failed to show that the trial schedule prejudiced his case or violated his due process rights. We agree with the State.

In Parton, this court concluded that late night court sessions should be held only when required by unusual circumstances. 817 S.W.2d at 33-34. Generally, however, a trial judge has broad discretion over the course and conduct of a trial, see State v. King, 40 S.W.3d 442, 449 (Tenn. 2001), and the determination of how late into the evening a trial session should be conducted is within the discretion of the individual trial judge. See State v. Poe, 755 S.W.2d 41, 47 (Tenn. 1988).

In denying relief on this claim, the post-conviction made the following findings of fact and conclusions of law:

It is this court's judgment that although the trial judge did hold court a little later than usual, there is no indication that it prejudiced the defendant's case, or deprived him of due process. All the lawyers were required to keep the same schedule. The time line indicates that the only night sessions went past about 8:30 p.m. was the fourth day. On that night, the jury retired for deliberations at 8:18 p.m., and ceased deliberations for the night at 10:09 p.m. Lawyers involved in a murder trial are not playing patty cake. Twelve hour days are not uncommon for surgeons, construction workers, or other workers in our society. This court cannot assume that holding court for the hours held in this case during that four day period amounted to an abuse of discretion by the trial judge. Appellate counsel was justified in not raising this issue on motion for new trial or on direct appeal.

The record supports the findings and conclusions of the post-conviction court. In its detailed findings of fact and conclusions of law, the post-conviction court reconstructed the trial schedule in the case, noting that court had recessed for the night at 8:30, 6:50, 8:35, and 10:09 p.m., but the trial court had included lengthy lunch and supper breaks in the schedule. The post-conviction court further noted appellate counsel's testimony that he was unaware of the extended court hours but even in hindsight did not think that the court schedule warranted being raised as an issue on appeal. The decision as to the issues to be raised on appeal is generally left to the sound discretion and professional judgment of appellate counsel. See Carpenter v. State, 126 S.W.3d 879, 887 (Tenn. 2004). The petitioner has not shown that appellate counsel was deficient for failing to raise the extended trial hours as an issue on direct appeal or that he would have prevailed had the issue been raised.

The petitioner next contends that appellate counsel was ineffective for not including trial counsel's failure to object to improper closing argument as one of his allegations of ineffective assistance of trial counsel. With respect to this issue, the post-conviction court found, among other things, that the petitioner failed to show that he was prejudiced as a result of appellate counsel's not raising the issue on appeal.

The record again supports the findings and conclusions of the post-conviction court. While appellate counsel acknowledged he missed the statement and believed that he should have raised it as an issue on appeal, he also testified that he did not think it was as strong as the other issues that he raised. Both senior and junior trial counsel described the risk created by raising objections during closing argument and testified that they could have made the strategic decision not to object to the statement in order to avoid emphasizing it to the jury. Because the reviewing court must indulge a strong presumption that the conduct of counsel falls within the range of reasonable professional assistance, see Strickland, 466 U.S. at 690, 104 S. Ct. at 2066, and may not second-guess the tactical and strategic choices made by counsel unless those choices were uninformed because of inadequate preparation, see Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982), it is highly unlikely that appellate

counsel could have succeeded in meeting either the deficiency or the prejudice prong of the ineffective assistance of counsel claim based on trial counsel's failure to object to the improper closing argument. Thus, the petitioner has not met the prejudice prong of his claim of ineffective assistance of appellate counsel.

As his final issue, the petitioner contends that appellate counsel was ineffective for not arguing for the admission of excluded hearsay testimony, which would have suggested another culprit in the crimes, under Tennessee Rule of Evidence 403(3) instead of Tennessee Rule of Evidence 404. The post-conviction court concluded, among other things, that appellate counsel's argument would have been stronger if based on the hearsay exception in Rule 403(3) but that the petitioner had not shown that he was prejudiced by appellate counsel's decision to rely on the hearsay exception in Rule 404.

In our review of this issue, we are mindful that the fact that a strategy or tactic failed or hurt the defense does not alone support the claim of ineffective assistance of counsel. See Thompson v. State, 958 S.W.2d 156, 165 (Tenn. Crim. App. 1997). The record reveals that appellate counsel was an experienced trial and appellate attorney who spent many hours in preparation for the appeal. The record further reveals that appellate counsel provided a reasonable explanation for his reliance on the hearsay exception in Rule 404, testifying that he viewed it as a vehicle for the admission of both of Horn's statements, and not just the statement Horn allegedly made before the killings. Moreover, as revealed by the summary contained in this court's direct appeal opinion, the State presented a compelling circumstantial case against the petitioner, which included evidence linking him to the murder weapon and testimony by three witnesses that he solicited their help in hiring someone to kill the victims. Thus, even had hearsay testimony been admitted indicating that a third party had threatened to kill the victims, it is unlikely, given the accumulated evidence against the petitioner, that it would have changed the outcome of his trial. The petitioner has not, therefore, met his burden of demonstrating either that appellate counsel was deficient for failing to base his argument for the admissibility of the hearsay testimony on Rule 403(3), or that he was prejudiced as a result of counsel's alleged deficiency.

### **CONCLUSION**

Based on our review, we affirm the denial of the petition for post-conviction relief.

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ALAN E. GLENN, JUDGE